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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
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10 JANE DOE,

11 Plaintiff,

12 vs.

13 CITY OF SAN DIEGO, et al.

14 Defendants.
15

CASE NO. 12-cv-689-MMA-DHB

**ORDER GRANTING
PLAINTIFF'S MOTION FOR
LEAVE TO FILE THIRD
AMENDED COMPLAINT**

[Doc. No. 84]

16 Presently before the Court is Plaintiff Jane Doe's ("Plaintiff") Motion for
17 Leave to File a Third Amended Complaint. [Doc. No. 84.] The Court, in its
18 discretion, took the matter under submission pursuant to Civil Local Rule 7.1(d)(1).
19 Having considered the briefs, and for the reasons stated herein, the Court **GRANTS**
20 Plaintiff's motion.

21 **I. PROCEDURAL BACKGROUND**

22 On February 9, 2012, Plaintiff filed a Complaint in San Diego County
23 Superior Court, naming the City of San Diego, Anthony Arevalos, Kevin Friedman,
24 and Does 1 through 50 as defendants. [Doc. No. 1, Ex. 1.] Plaintiff later amended
25 the Complaint to add William Lansdowne and David Bejarano as defendants. [Doc.
26 No. 1, Ex. 4.] On March 21, 2012, Defendants filed a Notice of Removal with this
27 Court, alleging proper subject matter jurisdiction under 28 U.S.C. section 1331.
28 [Doc. No. 1.]

1 Following a settlement conference on September 14, 2012, the Court issued a
2 Scheduling Order which required “any motion to join other parties, to amend the
3 pleadings, or to file additional pleadings” to be filed on or before October 13, 2012.
4 [Doc. No. 34 at 1.] Subsequently, on September 18, 2012, Plaintiff filed a Second
5 Amended Complaint (“SAC”) adding Rudy Tai and Danny Hollister as defendants.
6 [Doc. No. 35.] On February 20, 2013, the Court granted a joint motion to amend
7 the scheduling order which, among other things, extended the discovery cutoff date
8 to August 1, 2013, but did not extend the already-passed deadline to amend
9 pleadings. [Doc. No. 73.]

10 On March 15, 2013, Plaintiff filed the instant motion, seeking leave to file a
11 Third Amended Complaint (“TAC”) to add as defendants Max Verduzco, Victoria
12 Binkerd, and Robert Kanaski. Verduzco and Binkerd were Defendant Arevalos’
13 superiors in the San Diego Police Department at the time of a newly-alleged 2007
14 incident set forth in the proposed TAC at paragraph 19. Assistant Chief Kanaski
15 was allegedly involved in a separate 2010 incident involving Arevalos, also detailed
16 in paragraph 19 of the TAC. The proposed TAC contains identical causes of action
17 as the SAC, but adds additional allegations of the supervisory involvement of the
18 three additional defendants.

19 **II. LEGAL STANDARD**

20 Plaintiff asserts that Federal Rule of Civil Procedure 15(a)¹ provides the
21 proper legal standard for determination of this motion. [Mot. at 15.] Under Rule
22 15(a) of the Federal Rules of Civil Procedure, a party may amend the party’s
23 pleading once as a matter of course at any time before a responsive pleading is
24 served. Fed. R. Civ. P. 15(a). Otherwise, a party may amend only by leave of the
25 court or by written consent of the adverse party, and leave shall be freely given when
26 justice so requires. *Id.*

27 However, Rule 15 does not provide the initial standard under which the Court
28

¹All future rule references are to the Federal Rules of Civil Procedure unless otherwise noted.

1 considers Plaintiff's request to amend her complaint. When, as here, a district court
 2 has entered a scheduling order setting a deadline to amend the pleadings, and a party
 3 moves to amend the pleadings after the deadline, the motion amounts to one to
 4 amend the scheduling order and thus is properly brought under Rule 16(b) rather
 5 than Rule 15. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir.
 6 2000). "A schedule may be modified only for good cause and with the judge's
 7 consent." Fed. R. Civ. P. 16(b)(4). The decision to modify a scheduling order is
 8 within the broad discretion of the district court. *Johnson v. Mammoth Recreations,*
 9 *Inc.*, 975 F.2d 604, 607 (9th Cir. 1992) (quoting *Miller v. Safeco Title Ins. Co.*, 758
 10 F.2d 364, 369 (9th Cir. 1985)).

11 **III. DISCUSSION**

12 The Court's Scheduling Order set forth a pleading amendment deadline of
 13 October 13, 2012. [Doc. No. 34 at 1.] The current motion was not filed until March
 14 15, 2013. Thus, Plaintiff is required to demonstrate good cause under Rule 16 for
 15 filing an amended pleading five months past the deadline. *See Coleman*, 232 F.3d at
 16 1294.

17 **A. Rule 16 Analysis**

18 Under Rule 16(b)(4)'s good cause standard, the Court's primary focus is on
 19 the movant's diligence in seeking the amendment. *Johnson*, 975 F.2d at 609.
 20 "Good cause" exists if a party can demonstrate that the schedule "cannot reasonably
 21 be met despite the diligence of the party seeking the extension." *Id.* (citing Fed. R.
 22 Civ. P. 16 advisory committee's notes (1983 amendment)). "Although the existence
 23 or degree of prejudice to the party opposing the modification might supply
 24 additional reasons to deny a motion, the focus of the inquiry is upon the moving
 25 party's reasons for seeking modification." *Id.* (citations omitted). The party seeking
 26 to continue or extend the deadlines bears the burden of proving good cause. *See*
 27 *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002); *Johnson*, 975
 28 F.2d at 608.

1 In addressing the diligence requirement, a sister court has noted:

2 [T]o demonstrate diligence under Rule 16's "good cause"
3 standard, the movant may be required to show the following:
4 (1) that she was diligent in assisting the Court in creating a
5 workable Rule 16 order; (2) that her noncompliance with a
6 Rule 16 deadline occurred or will occur, notwithstanding her
7 diligent efforts to comply, because of the development of
8 matters which could not have been reasonably foreseen or
9 anticipated at the time of the Rule 16 scheduling conference;
10 and (3) that she was diligent in seeking amendment of the
11 Rule 16 order, once it became apparent that she could not
12 comply with the order.

13 *Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 608 (E.D. Cal. 1999) (citations omitted).

14 If the district court finds a lack of diligence, "the inquiry should end."

15 *Johnson*, 975 F.2d at 609. If, however, the movant clears the Rule 16 bar, the Court
16 proceeds to considering the motion under the usual standard of Rule 15.

17 Plaintiff asserts she was unaware of the involvement and potential liability of
18 Verduzco, Binkerd, and Kanaski until receiving discovery documents from
19 Defendants in mid-February 2013. Specifically, on February 15 Plaintiff received
20 witness statements regarding a traffic stop made by Defendant Arevalos of a 16-
21 year-old female in 2007. Verduzco and Binkerd were Arevalos' supervisors at the
22 time, and, upon receiving complaints about Arevalos' behavior during the stop,
23 allegedly covered up the incident. Next, documents obtained from the District
24 Attorney on February 22, 2013 included an email sent by Kanaski which indicated
25 he would not wait for an Internal Affairs investigation of a 2010 sexual assault
26 charge against Arevalos to be completed before placing "Tony" back on patrol.
27 Plaintiff states this was her first notice of Kanaski's involvement in and
28 circumvention of the sexual assault investigation. Plaintiff argues that the City of
San Diego's continued delay in producing requested personnel and investigatory
materials, and not her lack of diligence, prevented her from discovering the
involvement of Verduzco, Binkerd, and Kanaski.

Defendants do not contest that Plaintiff had no ability to learn of Verduzco,
Binkerd, and Kanaski's involvement prior to mid-February 2013. Instead,

1 Defendants argue the Court should deny Plaintiff's motion on the basis that Plaintiff
2 failed to satisfy the applicable legal standard with a declaration under penalty of
3 perjury as to why the Plaintiff could not satisfy the Court's scheduling order. [Opp.
4 at 3.]

5 The Court finds that Plaintiff has sufficiently demonstrated "good cause" to
6 amend the scheduling order; it is uncontested that she was unable to comply with the
7 scheduling order despite exercising due diligence. Furthermore, Plaintiff timely
8 requested leave to amend after obtaining information implicating Verduzco,
9 Binkerd, and Kanaski in the instant action. Defendants' argument regarding
10 Plaintiff's alleged failure to declare under penalty of perjury why Plaintiff could not
11 satisfy the Court's scheduling order is unpersuasive. Counsel's declaration in
12 support of Plaintiff's motion indicates throughout that Plaintiff did not know of the
13 proposed additional defendants' involvement until mid-February 2013. [See Linda
14 Workman Decl., Doc. No. 84-2.] Because the Court finds that Plaintiff satisfies the
15 requirements of Rule 16(b), the Court proceeds to consider the requirements of Rule
16 15(a).

17 **B. Rule 15 Analysis**

18 "Rule 15(a) is very liberal and leave to amend 'shall be freely given when
19 justice so requires.'" *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 445 F.3d
20 1132, 1136 (9th Cir. 2006) (quoting Fed. R. Civ. P. 15(a)). However, leave to
21 amend should not be granted where "amendment would cause prejudice to the
22 opposing party, is sought in bad faith, is futile, or creates undue delay." *Madeja v.*
23 *Olympic Packers*, 310 F.3d 628, 636 (9th Cir. 2002) (citation omitted). These
24 factors are not of equal weight; prejudice to the opposing party has long been held to
25 be the most crucial factor in determining whether to grant leave to amend. *Eminence*
26 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) ("As this circuit
27 and others have held, it is the consideration of prejudice to the opposing party that
28 carries the greatest weight"); *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th

1 Cir. 1990); *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973). The Court
2 considers each of these factors in turn.

3 ***1. Prejudice to the Opposing Party***

4 The most critical factor in determining whether to grant leave to amend is
5 prejudice to the opposing party. *Eminence Capital*, 316 F.3d at 1052 (“Prejudice is
6 the touchstone of the inquiry under rule 15(a)”) (internal quotes omitted). The
7 burden of showing prejudice is on the party opposing an amendment to the
8 complaint. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1986);
9 *Beeck v. Aquaslide ‘N’ Dive Corp.*, 562 F.2d 537, 540 (9th Cir. 1977). Prejudice
10 must be substantial to justify denial of leave to amend. *Morongo Band of Mission*
11 *Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). Under Rule 15(a), there is a
12 presumption in favor of granting leave to amend where prejudice is not shown.
13 *Eminence Capital*, 316 F.3d at 1052.

14 Defendants argue that they will suffer prejudice should Plaintiff be permitted
15 to file an amended complaint, because it “will start the discovery as to the individual
16 defendants all over again.” [Opp. at 4.] Defendants then incorrectly indicate that the
17 “discovery cutoff date has been set for May 17, 2013.”² [Opp. at 4.] Defendants
18 also claim that allowing Plaintiff to file an amended pleading will force them to
19 spend more time preparing a summary judgment motion, and require the City to
20 incur additional costs in defending against the action. [*Id.*] In response, Plaintiff
21 points out that the amended discovery cutoff date is August 1, 2013, and that trial is
22 not scheduled to begin until February 4, 2014. Thus, Defendants will have sufficient
23 time to conduct discovery, file motions, and prepare for trial.

24 The Court agrees with Plaintiff. Although allowing Plaintiff to add new
25 defendants will require additional discovery, the amended discovery cutoff date is
26 more than three months away. Furthermore, trial of this matter is not scheduled for
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28 ² The original discovery cutoff date was May 17, 2013. [See Doc. No. 34 at 2.] The Court,
however, later amended this date to August 1, 2013, per the parties’ request. [See Doc. No. 73.]

1 another ten months. Thus, the Court finds that Defendants have sufficient time to
2 conduct discovery, file motions, and otherwise defend against the action.
3 Furthermore, while it will undoubtedly cost the City more to defend the action, this
4 is an inherent cost in multi-party litigation, and does not amount to sufficient
5 prejudice to warrant denial of leave to amend. Accordingly, this factor favors
6 amendment.

7 **2. *Bad Faith***

8 There is no evidence that Plaintiff has acted in bad faith in seeking to amend
9 the complaint to add Verduzco, Binkerd, and Kanaski as defendants. Thus, this
10 factor weighs in favor of granting Plaintiff leave to file an amended complaint.

11 **3. *Futility of Amendment***

12 “Futility of amendment can, by itself, justify the denial of a motion for leave
13 to amend.” *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). The Ninth Circuit
14 has held that leave to amend may be denied as futile if the statute of limitations has
15 run. *See Deutsch v. Turner Corp.*, 324 F.3d 692, 718 n.20 (9th Cir. 2003). “[A]
16 proposed amendment is futile only if no set of facts can be proved under the
17 amendment to the pleadings that would constitute a valid and sufficient claim or
18 defense.” *Sweaney v. Ada County*, 119 F.3d 1385, 1393 (citations omitted).

19 Here, Defendants argue that amendment would be futile because all claims for
20 relief against Verduzco and Binkerd are barred by the applicable statute of
21 limitations. The statute of limitations on Plaintiff’s claims range from one year to
22 three years. Defendants argue that the sole allegations against Verduzco and
23 Binkerd involved conduct that allegedly occurred in 2007, so that any claim filed
24 now is barred. Plaintiff responds that she had no cause of action against Verduzco
25 and Binkerd until Arevalos sexually assaulted her in March 2011; before then, there
26 was no basis for liability.

27 “The general rule for defining the accrual of a cause of action sets the date as
28 the time when, under the substantive law, the wrongful act is done, or the wrongful

1 result occurs, and the consequent liability arises. In other words, it sets the date as
 2 the time when the cause of action is complete with all of its elements.” *Norgart v.*
 3 *Upjohn Co.*, 21 Cal. 4th 383, 397 (1999) (quotations and citations omitted). Under
 4 this rule, it appears feasible that there exists a viable theory under which the statute
 5 of limitations did not begin on Plaintiff’s claims against Verduzco and Binkerd until
 6 March 8, 2011. Furthermore, it appears that Plaintiff has identified facts which
 7 would support application of California’s relation-back law to deem her amended
 8 allegations filed on the date of the original pleading. *See* Fed. R. Civ. P.
 9 15(c)(1)(A); *Norgart*, 21 Cal. 4th at 398-99, 408-09 (explaining that the relation-
 10 back rule applicable to Doe defendants under California law can have the effect of
 11 enlarging a shorter statute of limitations period to three years).³ Thus, it is feasible
 12 that Plaintiff’s amended claims will be treated as being filed on February 9, 2012,
 13 less than one year after Plaintiff’s alleged March 8, 2011 injury. Accordingly, the
 14 Court cannot say that amendment would be futile due to the relevant limitations
 15 periods.

16 Finally, Defendants argue that amendment would be futile because Plaintiff’s
 17 proposed TAC does not state cognizable claims for relief against Verduzco, Binkerd,
 18 or Kanaski. The Court finds these arguments more properly addressed on a motion
 19 to dismiss. *See, e.g., Saes Getters S.p.A. v. Aeronex, Inc.*, 219 F. Supp. 2d 1081,
 20 1086 (S.D. Cal. 2002) (“While courts will determine the legal sufficiency of a
 21 proposed amendment using the same standard as applied on a Rule 12(b)(6) motion .
 22 . . such issues are often more appropriately raised in a motion to dismiss rather than

23
 24 ³ While Plaintiff’s SAC does not name Doe defendants in the caption, it does contain fact
 25 allegations against unknown defendants in the body of the complaint. [See SAC ¶ 7 (“Plaintiff is
 26 informed and believes that there are other Defendants which are entities or individuals who are in
 27 some manner legally responsible for the wrongdoing alleged in this Second Amended Complaint, and
 28 were a substantial factor in causing Plaintiff’s damages. Plaintiff does not know the true names of said
 Defendants. The names, capacities, and relationship of said Defendants will be alleged by amendment
 to the Second Amended Complaint when they are known.”); *see also id.* ¶¶ 8, 9, 10, 11, 24, 26, 27,
 28, 33, 118, 119.] As technical errors in the caption should not control over the substance of the
 complaint (*Rodgers v. Horsely*, 123 Fed App’x, 281, 286 (9th Cir. 2005)), the Court finds that failure
 to name Doe defendants in the caption does not establish that amendment would be an exercise in
 futility.

1 in an opposition to a motion for leave to amend.”). Therefore, the Court declines to
2 deny Plaintiff leave to amend due to futility.

3 **4. Undue Delay**

4 In assessing whether a plaintiff unduly delayed in seeking to amend its
5 complaint, the Court examines whether the plaintiff “knew or should have known
6 the facts and theories raised by the amendment in the original pleading.” *Jackson*,
7 902 F.2d at 1388. As stated previously, Plaintiff was unaware of the involvement of
8 the proposed defendants until mid-February 2013. Because Plaintiff sought to
9 amend her pleading within a month after receiving such information, there is no
10 evidence of undue delay. This factor thus weighs in favor of allowing leave to
11 amend.

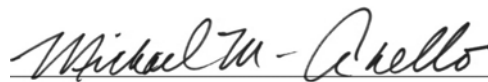
12 In sum, the Court finds that each of the relevant factors favors granting
13 Plaintiff leave to amend.

14 **IV. CONCLUSION**

15 Based on the foregoing, the Court **GRANTS** Plaintiff’s Motion for Leave to
16 File a Third Amended Complaint. Plaintiff shall file her proposed Third Amended
17 Complaint no later than April 22, 2013.

18 **IT IS SO ORDERED.**

19 DATED: April 18, 2013

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21 Hon. Michael M. Anello
22 United States District Judge
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